

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**HUNTINGTON DIVISION**

LARRY E. NEWBERRY,

Plaintiff,

v.

CIVIL ACTION NO. 3:18-1317

KIM WOLFE;  
WEST VIRGINIA DIVISION OF CORRECTIONS  
AND REHABILITATION;  
THE VILLAGE OF BARBOURSVILLE,  
WEST VIRGINIA;  
COUNSELOR STEPP;  
COUNSELOR PHILLIPS; and  
SARGENT DIAMOND,

Defendants.

**MEMORANDUM OPINION AND ORDER**

This action was referred to the Honorable Cheryl A. Eifert, United States Magistrate Judge, for submission to this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommended that the Motion to Dismiss filed by Defendants State of West Virginia, the DOC, Wolfe, Diamond, Stepp, and Phillips, (**ECF No. 27**), be **GRANTED**, in part, and **DENIED**, in part; the Rule 12(b)(6) Motion to Dismiss filed by The Village of Barboursville, (**ECF No. 31**), be **GRANTED**; and the Motion of Defendants Wolfe, State of West Virginia, the DOC, Diamond, Stepp and Phillips to Designate their Motion to Dismiss as Unopposed and to Dismiss the Complaint for Failure to Comply with the Order of the Court, (**ECF No. 35**), be **DENIED**. The Magistrate Judge further recommends that the claims against the DOC, the State of West Virginia,

and The Village of Barboursville be **DISMISSED**, and those defendants be **REMOVED** from the style of the case; that claims against Defendants Wolfe, Stepp, Phillips, and Diamond in their official capacities be **DISMISSED**; and that the claims against Defendants Wolfe, Stepp, Phillips, and Diamond in their personal capacities **REMAIN PENDING** to allow the parties an opportunity to conduct discovery. Neither party has filed objections to the Magistrate Judge's findings and recommendations.

Accordingly, the Court accepts and incorporates herein the findings and recommendation of the Magistrate Judge and, consistent with the findings and recommendations, **ORDERS** that the Motion to Dismiss filed by Defendants State of West Virginia, the DOC, Wolfe, Diamond, Stepp, and Phillips, (**ECF No. 27**), be **GRANTED**, in part, and **DENIED**, in part; the Rule 12(b)(6) Motion to Dismiss filed by The Village of Barboursville, (**ECF No. 31**), be **GRANTED**; and the Motion of Defendants Wolfe, State of West Virginia, the DOC, Diamond, Stepp and Phillips to Designate their Motion to Dismiss as Unopposed and to Dismiss the Complaint for Failure to Comply with the Order of the Court, (**ECF No. 35**), be **DENIED**. The Court further **ORDERS** that the claims against the DOC, the State of West Virginia, and The Village of Barboursville be **DISMISSED**, and those defendants be **REMOVED** from the style of the case; that claims against Defendants Wolfe, Stepp, Phillips, and Diamond in their official capacities be **DISMISSED**; and that the claims against Defendants Wolfe, Stepp, Phillips, and Diamond in their personal capacities **REMAIN PENDING** to allow the parties an opportunity to conduct discovery.

The Court **DIRECTS** the Clerk to forward copies of this written opinion and order to all counsel of record, and any unrepresented parties.

ENTER: June 5, 2019



ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE